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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 585

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

JAMES M. BORUM, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully shows that it seeks a review by this Court of the final judgment of the Supreme Court of Minnesota, the court of last resort of that State, awarding respondent $14,059.65 damages, and affirming the judgment of the District Court of Minnesota, Hennepin County, in respondent's action under the Federal Employers' Liability Act (35 Stat.

65) to recover for injuries sustained while employed as a switchman in interstate commerce.

Summary Statement.

Respondent induced petitioner to employ him as a switchman by falsely pretending that he qualified under rules enforced for the purpose of increasing the safety and efficiency of railway operations.

For that purpose, petitioner had a rule and practice to accept no applicant for train service, unless he was under 45 years of age and obtained from the Company Surgeon a certificate of physical fitness.

Knowing this and being 49 years of age, respondent falsely represented that he was only 38, both in his application for employment and in his statement to the Company Surgeon, who, relying thereon, furnished the certificate of physical fitness upon which respondent was accepted as a switchman.

Some years later, respondent was injured at work and brought this suit against petitioner, on the theory that he was its employee within the meaning of the Federal Employers' Liability Act.

Petitioner then discovered the deception which respondent had practiced, and pleaded it in defense of his suit as preventing him from acquiring the status of an employee entitled to the benefits of the Act.

Whether respondent had that status is the sole question involved.

Reason Relied on for the Writ.

The Federal Employers' Liability Act was erroneously construed in a manner tending to defeat its

purpose and constitutional justification of increasing the safety and efficiency of interstate commerce, in holding that respondent had the status of an employee entitled to its benefits.

WHEREFORE petitioner, referring to the attached brief in support of its reasons for review, respectfully prays that this Court issue a writ of certiorari, directed to the Supreme Court of Minnesota, to certify and send to this Court a full and complete transcript of the record herein, to the end that the case may be reviewed and determined by this Court as provided by law, and that the decision of the Supreme Court of Minnesota may be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray, etc.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
By HENRY S. MITCHELL,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinion of the Court Below.

This was filed on September 18, 1931. It has not been officially reported. It is found at R. 250-270.

Jurisdiction.

The judgment to be reviewed was filed on September 29, 1931 (R. 273).

The parties stipulated that petitioner had paid respondent $12,500 for his injuries irrespective of the question as to its legal liability; that this question should be submitted to arbitration under Chapter 81, G. S. Minn. 1923 (which permits a review by the courts), and that the arbitrators should award respondent an additional $12,500, if they found that he was an employee of petitioner within the meaning of the Federal Employers' Liability Act (R. 1).

The arbitrators made specific findings of fact and found as a matter of law that respondent was an employee within the meaning of the Act and awarded him the $12,500 (R. 190-194, 199-202).

Petitioner moved in the State District Court to vacate the award (R. 203-206).

The State District Court confirmed the findings and award and entered judgment for that amount, holding that respondent was an employee within the meaning of the Act (R. 211-216, 219, 220).

On appeal to the Supreme Court of Minnesota petitioner assigned as error the decision of the District Court that respondent was an employee within the meaning of the Act (R. 221-224).

The Supreme Court of Minnesota affirmed the judgment of the District Court (R. 273). It held that respondent was entitled to the benefit of the Act (R. 269).

The statutory provision under which the jurisdiction of this Court is invoked is Sec. 237 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (43 Stat. 937).

A case believed to sustain the jurisdiction is *M., St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 410.

Statement of the Case.

Respondent admitted that he *habitually* misrepresented his age to railroad companies as 11 years younger than his true age (R. 84). In 1911, at the age of 39, he gave his age as 28, when he *first* applied to petitioner for employment, knowing that it then had a rule to admit no one over 35 to its train service (R. 55-57, 63). In 1912, at the age of 40, he gave his age to petitioner as 28½, when he took a written examination on its operating rules (R. 65-67). In 1917, when he was 44½, he gave his age as 34, to the Great Northern Railway Company, in obtaining employment with that company (R. 84, 87). In 1917, when almost 45, he gave his age as 34, to the Great Western Railway Company, in applying to that company for employment (R. 89, 90).

When last admitted to petitioner's service, in 1921, he gave his age as 38, being in fact 49 years old, and knowing that petitioner then had a rule against admitting men over 45 into the service (R. 69-72). In 1925, when he was 53, he gave his age as 43, when examined by one of respondent's officers for vision, etc. (R. 78, 79). In 1926, when he was 53½, he gave his age as 42½, in taking a written examination on petitioner's operating rules (R. 75-77). He never told anyone connected with petitioner his true age up to the time of his accident (R. 79). Respondent himself admitted the above misrepresentations, explaining that he was "afraid of the age limit" and wished "to get by on the age limit" (R. 60, 64, 65, 67).

The arbitrators found that respondent understood, when he re-entered petitioner's service in 1921, at the age of 49, that it had a rule or practice against accepting men over 45; that it was for the purpose of securing employment in disregard of that rule or practice that he gave his age as 38 both in his written application to the employment officer and in his written statement to the company surgeon; that such statement of his age was relied on by the surgeon in issuing a certificate of physical fitness for respondent, and that those proceedings were a regular and essential part of securing such employment with petitioner and the basis on which it accepted respondent (R. 199, 200).

They also found that it was for the purpose of promoting safety and efficiency in its railroad operation that petitioner had the rule that:

> "No person inexperienced in railroad work over 35 years, and no experienced person over

> 45 years, shall hereafter be taken into the service" (R. 193, 200).

Also, that respondent's claim that his true age was known to petitioner was not established (R. 192).

Also, that it was a general practice for men over 45 to give their age as under 45 when applying to petitioner for employment; that petitioner was aware of such practice, and had employed men over 45 temporarily (R. 199, 200).

Also, that there was an agreement between petitioner and various organizations of its employees to the benefit of which respondent was entitled, reading as follows:

> "Applications for employment in yard service not rejected in thirty days will be considered accepted" (R. 192, 193).

Assigned Error Intended to be Urged.

The Court erred in construing the Federal Employers' Liability Act contrary to its constitutional purpose of making interstate commerce safer and more efficient, in affirming the arbitrators' finding that respondent was an employee of petitioner within the meaning of that Act, in confirming the award of damages to respondent as such an employee, and in ordering and entering judgment pursuant thereto (R. 221-224).

ARGUMENT.

Chief Justice Wilson and Justice Loring held, in dissenting, that the case is controlled by this Court's previous decision that a switchman was not an em-

ployee within the meaning of the Act, when he had obtained his employment by fraudulently procuring the required certificate of physical fitness. *M., St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 410.

Their view harmonizes with the conclusion of the Illinois Appellate Court (the Court reversed in the Rock case) that the decision against Rock precluded recovery under this Act by a switchman who obtained his employment by fraudulently suppressing the fact that he had been employed by another railroad company and injured. *Ward* v. *E. J. & E. Ry. Co.*, 259 Ill. App. Ct. Reps. 672. As that opinion is not there reported in full, copies have been furnished to the clerk of this Court.

So, too, the Texas Court of Civil Appeals held that the decision against Rock prevented a switchman from recovering under this Act when he had obtained his employment by fraudulently concealing the fact that he had worked for another railroad company and was discharged for color blindness. It was held immaterial that tests of his eyes by the company defending his suit had failed to disclose his color blindness. *Ft. Worth & D. C. Ry. Co.* v. *Griffith*, 27 S. W. (2d) 351, 354. Citing the Rock case as authority, the Court declared:

> "The safety of the traveling public is involved in a contract of this character, and for reasons of public policy it is held that the contract is void and, in effect, that appellee never became an employee of the appellant."

We see no conflict in the denial of certiorari in *Missouri Pac. R. Co.* v. *Guillory*, 283 U. S. 849. The writ

was sought to review a judgment recovered under this Act by a member of a bridge crew, for alleged error in denying a peremptory instruction against him, because his signed application for employment misstated his age. He testified that he had given his age correctly. The jury found specifically that he did not misstate it. No fraud being established, the principle of the Rock case did not apply. Moreover, there is an important difference between a man employed in construction work and one employed in train service.

The basis of the decision against Rock was the method by which he *obtained* his employment, for the Court declared:

> "We are called upon to decide whether, notwithstanding the means by which he got employment and retained his position, respondent may maintain an action under the Federal Employers' Liability Act" (p. 413).

The principle astablished seems to be that a man's obtaining of such employment by deception which frustrates his attempted exclusion by reasonable regulations for the purpose of promoting safety (which is the Act's own purpose) makes his recovery contrary to the public interest. The Court said in denying the recovery:

> 'The deception by which he subsequently secured employment set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest because calculated to embarrass and hinder the carrier in the performance of its

> duties and to defeat important purposes sought to be advanced by the Act'' (p. 414).

Of course, the deception must be substantial for that principle to apply. *De minimis non curat lex.* Falsifying one's age to the extent of 11 years is a substantial deception, particularly in train service.

Of course, too, the regulation evaded must be a reasonable one for promoting safety and efficiency, if the principle is to apply. The Rock case recognized as such the requirement which Rock evaded of a certificate of physical fitness from the company surgeon. The present respondent evaded that same requirement.

The distinction between the methods by which Borum and Rock evaded that requirement seems immaterial. Rock obtained his certificate by having another man impersonate him. It is hardly credible that the decision would have been in his favor if he had, in his own person, fraudulently misrepresented himself to the examining surgeon as having had no operation and being free from stomach ulcers and hernia. Borum procured his certificate, in his own person, by falsely pretending to the surgeon that he was under the age limit for admission. Each obtained his certificate by fraud, which in effect nullified the company's requirement of such a certificate, by procuring it through false pretenses.

Respondent also frustrated the rule against accepting men over 45 by misrepresenting his age to the employment department. In itself, that rule was a reasonable safety regulation. The testimony showed

how it is enforced by railroads in general to promote safety and efficiency by keeping down the average age of men in train service (R. 153). Switching is the most dangerous work in railroading, requiring great physical agility (R. 153, 154). Respondent himself admitted that he would not expect most men of his age to get around as quickly and take care of themselves and the safety of other people as well as younger men (R. 83).

The arbitrators found as a fact, on the evidence, that the 45-year rule had the purpose of promoting safety and efficiency (R. 200). The majority opinion of the Minnesota Supreme Court did not go to the extent of denying that it is a reasonable safety regulation, but tried to minimize the importance of Borum's evasion of it, by emphasizing that he had not reached the retirement age of 65 and that petitioner permitted other men to remain in the service until that age. That seems entirely beside the point.

Just as Borum may have worked with men of his own age whom petitioner knowingly retained in service, so, too, it has doubtless kept men in service with the same organic troubles which Rock had. There was no complaint that Rock was inefficient in his work, any more than that Borum was inefficient in his. Borum's offense did not consist in being over 45, nor Rock's in having been operated on for appendicitis and being troubled with stomach ulcers and hernia. In each case the offense consisted in the fraudulent setting at naught of regulations calculated by and large to promote the safety and efficiency of the switching service by keeping such men from *entering*.

The limited proportion of men over 45 which the service contains if men do not *enter* over that age can be fitted into relatively safe positions without undue hazard. Some positions in switching are safer than others. Switching to and from industry tracks and repair yards is safer than switching in classification yards where trains are made up and broken up, and cars ridden by the men are kicked in and out, under pressure to have trains ready on schedule time. A switchman who has the position of foreman remains comparatively safe directing a crew of two or three who actually climb cars, ride them, set brakes, etc. Especially, work by daylight is less dangerous than in the dark of night.

If the service contains an excessive number of men over 45 because of entering when older by understating their ages, the inevitable result is that older men do more dangerous work calling for younger and more active men. The company is not free to assign a switchman to safer work as and when his actual physical condition seems to call for it. It is common knowledge that existing agreements with employees' organizations authorize the men to select their positions in accordance with their "seniority" in years of service.

On entering the service a man goes to the bottom of the "seniority" list. Men higher on the list always have a prior right to the more attractive positions, even though they are younger than those below them. When respondent was injured at the age of 56, men above him on the list were still depriving him of the easier positions, leaving him to perform the harder

and more dangerous work. He was not yet a foreman, and still worked at night, in a classification yard, climbing up and down cars to set brakes and throw switches (R. 20-25).

He did not have the normal right of a switchman of 56 to a better job. At that age, a man would have no less than 11 years' "seniority rights," if he was not over 45 when he entered the service. The fact that respondent was four years over 45 on entering left him at 56 with four years less seniority rights than men that old who entered at 45, depriving him to that extent of the normal privilege of a man of his age to select a better position, whereby the risk of his accident would have been avoided.

In still another way, evading the rule against entering switching service after 45 undermines the safety of railway operations. It prevents enforcing the rule for retiring at 65. This is compulsory, unless special authority is obtained each year after reaching 65, based on contemporary physical examination, to continue from year to year, to a maximum age of 70 (R. 193, 194). Otherwise, it is considered positively unsafe for men to remain at such work beyond 65 (R. 154, 156).

The company does not know that an employee has reached 65 until this is shown by his own statement made on entering the service (R. 161). Thus a man like respondent who understated his age by 11 years on entering might remain in train service until the advanced age of 76, without the knowledge of the company, with no further physical examination, with retarded agility and sensory reactions, a menace to

the safety of himself and others. Even respondent's age of 56 may have retarded his hearing the locomotive behind him and jumping out of its way.

Respondent admitted that he understood he could remain in service, in view of his misstatement of his age, until he was 76 (R. 81). That he deliberately contemplated this is a legitimate inference from his long-continued and consistent misrepresentation of his age. Multiplication of such menaces to the safety of railway operations would naturally result from condoning his conduct.

The majority opinion emphasized the fact, known to petitioner, that men over 45 frequently understate their age in seeking admission to the service. From the standpoint of the public interest, that accentuates the hazards thus introduced and the undesirability of increasing them by condoning such offenses. From the standpoint of the offender, it hardly lies in his mouth to defend his fraud on the ground that such offenses are common. From the standpoint of the railroad company, the suggestion is that it should not be allowed to assert respondent's fraud as a defense to his suit, because it did not undertake to ascertain his true age from other sources.

In asserting that accurate information on that point was "readily available" the majority opinion ignores the facts (R. 268). When respondent gave his age in his application as 38 instead of 49, no attempt at verification by examining the records of his previous employment by other companies would have exposed his fraud. With them, too, he had consistently pretended to be 11 years younger than his true age (*supra* —).

Indeed, petitioner had to employ lawyers in Illinois, where respondent was born, and they had to resort to the family Bible, in order to ascertain the true date of his birth, when it was suspected after this suit was begun that he had falsified his age (R. 189).

Looking beyond the present case, the verification of applicants' given ages is, in general, no easy matter. Birth certificates are obviously difficult to secure, not only for men born in this country in counties where such records were not then kept, but especially for the large number of men born in foreign countries. All such considerations are ignored by the majority opinion.

The majority opinion states that petitioner "just about knew" that respondent's age was "suspicious" (R. 265). The record furnishes no warrant for that suggestion of virtual complicity by petitioner in respondent's misrepresentation. The arbitrators made a finding which remains in full force that his evidence on his claim that his true age was known to petitioner was too "unsatisfactory" to support a finding to that effect (R. 192). That he had the appearance of the age he gave is shown by the fact that the Company Surgeon, despite a rigorous physical examination, was deceived into believing his statement that he was 38 (R. 114-117).

The majority opinion attempts to distinguish the decision against Rock as based on the view that "he was not the man for whose services the defendant (railroad) contracted" (R. 265). The view that Rock's contract of employment was void because of mistake as to his identity was submitted to this Court in the

railroad company's petition for certiorari and brief after the writ was granted. When its counsel undertook to argue the point orally, Mr. Justice Holmes took issue on the ground that the company knew it was employing the man who appeared before the employing officer, namely, Rock, in spite of his altering his name and procuring through another person his certificate of physical fitness. When counsel still attempted to argue that there was an essential mistake, Chief Justice Taft intimated that he should pass to another point. When the Court rendered its decision against Rock, per Mr. Justice Butler, the doctrine of mistake was not even mentioned. All this was explained to the Minnesota court. The attempt of the majority opinion to distinguish this Court's decision as based on a ground it rejected seems somewhat uncalled for.

The majority opinion was just as clearly unsound in attempting to distinguish this case from the Rock case on the ground that respondent's misrepresentation of his age had no causal connection with his injury (R. 269). If he had not falsified his age, he would not have obtained the employment wherein he was injured. Rock's injury, also, was not directly caused by the defects he had concealed, but this Court said, and it applies equally here,

> "The misrepresentation and injury may not be regarded as unrelated contemporary facts" (p. 415).

The majority opinion was on equally untenable ground in emphasizing the basis on which the arbitrators held that respondent was an employee within

the meaning of the Act. This was petitioner's thirty-day probation rule, reading as follows:

> "Applications for employment in yard service not rejected in thirty days will be considered accepted."

That rule was erroneously construed as meaning that no fraud in the application may be asserted after thirty days. The rule, quoted above in its entirety, obviously makes no such provision. It merely fixes the effective date of acceptance of the application, when the contract of regular employment begins. It says nothing about subsequent avoidance of the contract for subsequently discovered fraud in procuring it.

Emphasis was placed on the testimony of the chief clerk in petitioner's employment office, somewhat supported by another employing officer, that the rule meant that the applicant would be "immune from discharge" after thirty days for anything "in connection with his application" (R. 263, 264). Neither witness testified that any such construction was ever followed in actual practice. In short, neither was testifying to any fact, but giving his obviously erroneous construction of a written instrument. The judicial function of properly construing the rule cannot be avoided on the ground that a lay witness has misconstrued it.

In any event, immunity from *discharge* on account of such fraud would not necessarily include a right to recover under this Act. Assume that petitioner agreed (as it did not) not to discharge respondent, and that such agreement would be binding. The question would still remain whether it would be consistent with public

policy for the courts to recognize him as being entitled to the benefits of the Act whose purpose he defeated in obtaining his employment.

Conclusion.

In sustaining the constitutionality of this Act in *Second Employers' Liability Cases*, 223 U. S. 1, 50, 51, this Court said of its provisions:

> "The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines."

That object of the Act was emphasized in the Rock case, where this Court declared (p. 413):

> "The carriers owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service. The enforcement of the Act is calculated to stimulate them to the proper performance of that duty."

The resulting implication that the Act may *not* be regarded as being *solely* for the benefit of injured employees was plainly expressed in a case cited with approval in the Rock case, *McNamara* v. *Washington Terminal Co.*, 37 D. C. Appeals, 384, 393, where the court declared that the Act

> "possesses a broader and higher object—to require companies engaged in the business of com-

> mon carrier to exercise the highest care in the selection of their employes and in the use of approved equipment, in order that the agencies of commerce may be operated not only with the greatest degree of safety to the men employed, but that people and property may be transported without loss or injury."

Nevertheless, the majority opinion of the Minnesota Supreme Court construes the Act as if the sole object were to provide compensation for men injured through the negligence of fellow employees. It disregards the purpose of impelling carriers to make interstate commerce safer through regulations like the present for maintaining a high standard of efficiency among employees conducting such commerce. The decision that rules embodying that purpose may be fraudulently evaded without any sacrifice of the right to compensation encourages such evasions. It thus makes the Act's provision for compensation defeat its own higher purpose and constitutional justification of increasing the safety and efficiency of interstate commerce.

It is respectfully submitted that the Minnesota Supreme Court erred in not following the principle of the Rock case and that the writ should be allowed.

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